No. _____

In the United States
Circuit Court of Appeals
For the Ninth Circuit

LEONG CHONG WING,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANT

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BRIEF OF APPELLANT

JURISDICTION OF THE COURT

This is an appeal from a conviction in the District Court of the Western District of Washington, Northern Division, upon an indictment charging the appellant and one Lyle G. Gray with unlawfully, knowingly and feloniously receiving, concealing, buying and selling and facilitating the transportation and concealment of opium prepared for smoking (Section 174, Title 21, U.S.C.A.) and also of wilfully, unlawfully

and feloniously concealing and transporting opium prepared for smoking, which had been imported into the United States from a foreign country without submission for inspection by any officer of the customs service of the United States (Section 1593 b. Title 19 U.S.C.A.).

The Federal Courts have jurisdiction to determine issues arising out of the construction of Federal statutes (28 U.S.C.A. 41; Judicial Code, Section 24, Paragraph 1).

The Circuit Court of Appeals has jurisdiction to reverse judgments of the District Court (28 U.S.C.A., Section 225; Judicial Code, Section 128).

STATEMENT OF THE CASE

The Grand Jury for the Northern Division of the Western District of Washington, during the January term of 1937, returned an indictment against Leong Chong Wing and Lyle G. Gray, charging them in count one with unlawfully, knowingly, feloniously and fraudulently receiving, concealing, buying, selling and facilitating the transportation and concealment after importation of one ounce of opium prepared for smoking and also charging them in count two with wilfully, unlawfully, feloniously and fraudulently receiving, concealing, buying, selling and facilitating the transportation and concealment of certain dutiable merchandise, to-wit: one ounce of opium prepared for smoking, with-

out the same having been submitted for inspection by any officer of the customs service of the United States.

On the day of the trial, on oral motion by the United States District Attorney, count two of the indictment was dismissed. On the 5th day of August, 1937, the appellant, Leong Chong Wing, was found guilty as charged in count one of the indictment and Lyle G. Gray was found not guilty in count one of said indictment. The evidence tended to show that several years ago the appellant was convicted of a violation of the narcotic laws; that on January 29, 1937, customs agents followed the appellant's car from his home in the residential district of Seattle to the downtown district and saw him pick up Mr. Gray in his automobile. On February 12th customs agents again followed the appellant's car from his said home and at 3rd and Lenora streets in the city of Seattle, they saw the car stop and Mr. Gray entered the car. The officers immediately blocked the car from traffic and placed the appellant and the said Gray under arrest. At that time the officers gave the car a hasty search without finding anything, took the appellant and Gray into custody and brought them to the customs office in the Federal Building and took the appellant's car to the Customs Garage and officers thereupon searched the car again and found one ounce of opium prepared for smoking.

The officers knew the license number of Wing's car since January 29th, but made no effort to procure a

search warrant for the search of the same, although they claimed to have information that Wing had received a quantity of narcotics about December 15th, and they claimed to have had information from a source they considered reliable that Wing was to deliver narcotics to a white man on February 12th.

A motion to suppress was made prior to the trial, denied, and an exception noted, which motion was thereafter renewed during the progress of the trial, and upon the introduction of State's Exhibit 1 in evidence, being the ounce of opium found in Wing's car at the Customs garage, and objected to as contravening the rights of the appellant under the Constitution and laws of the United States, upon being overruled, an exception was again noted. (R. pp. 26, 27, 28, 35, 40.)

A motion for a directed verdict was made at the close of the Government's case, renewed at the close of all the testimony, and upon the Court denying the same, exceptions were reserved. (R. pp. 35, 40.)

Most of the hearsay evidence was permitted to go into the record in order that the Court could have a full and complete picture of the facts to determine whether or not the officers had probable cause in making the arrest, search and seizure.

The appellant, Wing, was arrested at the corner of 3rd and Lenora at the hour of about 2:30 p. m., while customs agents were following him since about 12:30

p. m. (R. pp. 27, 29, 32.) He was followed by three Government cars and visited an apartment house, where he remained for a considerable period of time. The distance from where he was first seen and was finally arrested is approximately a mile and a half.

B. C. Polite, who was in charge of the detail, arrested Wing and Gray on suspicion, and the finding of the narcotics in the car at the Customs garage bore out his suspicions that the information he had had prior to this time was correct. (R. p. 32.)

The questions raised for review on this appeal are briefly as follows:

1. Failure of the trial court to direct a verdict in the appellant's behalf upon motions made both at the conclusion of the Government's case and at the conclusion of all the evidence.
2. Error committed by the trial court in failing to to sustain appellant's motion to suppress Exhibit 1 made prior to the trial.
3. Error committed by the trial court in admitting Government's Exhibit 1 in evidence.

SPECIFICATION OF ERRORS

Specification of Error No. 1 (Assignment 4, R. p. 69)

Specification of Error No. 2 (Assignments 1 and 2, R. p. 68)

ARGUMENT

SPECIFICATION OF ERROR NO. 1

Assignment No. 4

The Court erred in denying the motion of appellant for a directed verdict of not guilty, and renewed at the close of all the evidence, because there was no substantial or competent evidence to sustain the charge upon which the verdict was rendered. (Appendix, p. 1.)

This Court has on numerous occasions held that the possession of smoking opium carries with it the presumption that it was unlawfully imported into the United States. In no case, however, has the question been squarely raised as it is in this case. While the chemist identified the same as smoking opium, he further testified that he could not tell whether this had been manufactured in the United States or not, as is shown by the testimony of Hugo Ringstrom. (R. 32.)

Of course, with Exhibit 1 out of the evidence, the Government had no case at all to submit to a jury, but this will be discussed under a separate heading.

SPECIFICATION OF ERROR NO. 2

Assignments 1 and 2

If Wing had been taken before a United States Commissioner or tried to the Court without the finding

of any narcotics, no Commissioner would bind him over, no Grand Jury indict him, and no jury find him guilty. At the time the first search was made, no narcotics were found at all. (R. p. 25.) Under those circumstances no case, of course, was had. He had committed no offense in the presence of the officers and they did not have any reasonable ground to apprehend that a felony had been committed. Upon being taken to the garage, after he had been placed under arrest, not charged specifically, with any crime, and with no evidence upon which a conviction could be had for any offense, his car was again searched and the narcotics, being Exhibit 1, were found. This search was not an incident to an arrest, for no offense that the officers knew of had been committed. The subsequent search was for the purpose of discovering evidence upon which a conviction could be had. If, under all of these circumstances, narcotics had not been found, unquestionably Wing could have maintained, had he so desired, an action for false arrest based upon the evidence as set out in the trial and in the affidavits of the various officers. (*Agnello vs. U. S.*, 46 S. Ct. 4.)

The affidavits in support of the motion to suppress were pure hearsay and a motion to strike them was regularly and duly made on the ground of hearsay. (R. p. 61.)

Before officers can search without a search warrant they certainly must be in possession of such evidence as would be competent to establish probable cause be-

fore a Commissioner in making application for a search warrant.

> "The evidence before the judge or Commissioner who issues the search warrant must be such as would be admissible on trial." (*Giles vs. U. S.,* 284 F. 208.)
>
> "The Commissioner must be furnished with facts—not suspicions, beliefs or surmises." (*Veeder vs. U. S.,* 252 F. 414.)

A search warrant cannot be obtained on hearsay evidence. (*Wagner vs. U. S.,* 8 F. 2nd, 581.)

All searches and seizures made by customs or revenue officers must conform to the Fourth Amendment and must not conflict therewith. (*Wagner vs. U. S.,* 8 F. 2nd, 581.)

With this incompetent evidence out of the way, it is obvious that the officers did not have probable cause. If their suspicions were well founded, they should have gone to a United States Commissioner and requested the issuance of a warrant because they had under all the evidence, sufficient time in which to do so. (R. pp. 27, 29.) Certainly under evidence of this hearsay nature, no Commissioner would issue a search warrant. This is not like the *Husty* or *Carroll* cases, because in this case the automobile had been watched, under the testimony of the officers, for a period of over a month. They knew where it was kept, and they had followed it on different occasions. (R. p. 25.)

In the *Carroll* case the officers had personal knowl-

edge that Carroll was actively engaged in bootlegging and transporting liquor, they having had conversations with him with reference to purchasing liquor; in the instant case they had no such knowledge. In the *Carroll* case, Carroll was arrested on the Detroit-Grand Rapids highway, which was a road notorious because of its use by smugglers and bootleggers; in the instant case the defendant was arrested in the downtown shopping district of Seattle. In the *Carroll* case, Carroll, at the time of his arrest, was in the same automobile which he was driving at the time he made a deal to sell liquor to the officers; in the instant case, the officers had no knowledge that the defendant's car had ever been used for any unlawful purpose. In the case of *Husty vs. U. S.,* (282 U. S. 694) the officers had personal knowledge that Husty was a bootlegger and had been for a number of years, and had arrested him on two previous occasions for liquor violations; in the instant case, the officers were not acquainted with the defendant and knew nothing about him except hearsay and that he had had one conviction on a narcotic law violation several years ago. In the *Husty* case the officers had known his informant in business and socially for eight years; in the instant case the officers were not well acquainted with their alleged informant. In the *Husty* case two occupants of Husty's car jumped out of the car and ran away at the approach of the officers; in the instant case, of course, no such thing occurred to give the officers any probable cause to believe that a crime

was being, or had been, committed. In the case of *Stobble vs. U. S.* (91 F. 2nd 69), the officers had talked to and interviewed persons leaving the Stobble residence with narcotics in their possession and who informed the officers that they had purchased said narcotics from the Stobble woman; in the instant case the officers had no information that the defendant ever sold narcotics to anyone. In the *Stobble* case the officers saw Miss Stobble carrying a container such as is used for wrapping heroin, from her house to her car, and also at the time of seizure saw said container or package in her lap, fully exposed to view; in the instant case the officers saw nothing and had to search the car twice before they succeeded in finding one ounce of opium.

> "Those lawfully in the country, entitled to use the public highways, have a right to free passage without interruption or search *unless there is known* to a competent officer, authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise." (*Carroll vs. U. S.*, 267 U. S. 132.) (Italics ours.)

> "In cases where the securing of a warrant is reasonably practicable, it must be used." (*Carroll vs. U. S.*, 267 U. S. 122.)

In view of all of the evidence the court cannot escape the conclusions that the officers, at most, had nothing but hearsay and suspicion to warrant stopping the appellant, placing him under arrest and searching his car. (R. p. 32.) They did not have any evidence which they could have placed before a Commissioner which

would give the Commissioner probable cause to believe that the appellant was violating the law or transporting contraband. Furthermore, the officers knew where the appellant lived, knew his car and license number and were getting their alleged tips in ample time to have procured search warrants. (R. pp. 25, 27, 29.)

At the time the officers arrested appellant they were using three automobiles and had ample facilities to follow the appellant and also to obtain the necessary search warrant if they could have convinced a Commissioner that a search warrant should issue. (R. pp. 28, 31.)

We earnestly contend that in searching the appellant's car the officers acted arbitrarily and unlawfully and the court erred in not granting the appellant's motion for a directed verdict and motion to suppress the evidence.

Respectfully submitted,

JOHN F. GARVIN,

Attorney for Appellant.

APPENDIX

ASSIGNMENTS OF ERROR INCLUDED UNDER SPECIFICATION NO. 1

4. The Court erred in not directing a verdict of not guilty for the defendant, Wing.

ASSIGNMENTS OF ERROR INCLUDED UNDER SPECIFICATION NO. 2

1. The Court erred in failing to grant defendant's motion to suppress.

2. The Court erred in admitting Government's Exhibit No. 1 in evidence.